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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

In re RYAN HERNANDEZ

on Habeas Corpus.

G052350

(Super. Ct. No. 12NF0439)

O P I N I O N

Original proceedings; petition for a writ of habeas corpus to file a timely notice of appeal. Petition granted.

Appellate Defenders, Inc., and Anna M. Jauregui-Law for Petitioner.

Kamala D. Harris, Attorney General, and Julie L. Garland, Assistant Attorney General for Respondent.

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THE COURT: *

Petitioner, Ryan Hernandez, seeks relief for a second time from the failure to file a timely notice of appeal. The petition is granted.

Ryan Hernandez was convicted following a court trial and sentenced to 9 years 4 months in state prison. In her declaration, trial counsel states she discussed filing a notice of appeal with Hernandez and it was his intention that she file a notice of appeal on his behalf. According to trial counsel, when she realized that she inadvertently failed to file a timely notice of appeal, she attempted to file a late notice of appeal, but the superior court marked the notice “Received 04/21/15, but not filed,” and transmitted a letter to trial counsel explaining the last day to file a timely notice of appeal was December 16, 2014.

On August 3, 2015, petitioner filed a petition for writ of habeas corpus seeking relief from the failure to file a timely notice of appeal pursuant to *In re Benoit* (1973) 10 Cal.3d 72. The Attorney General advised this court that she did not oppose granting the petition without the issuance of an order to show (*People v. Romero* (1994) 8 Cal.4th 728) and on October 8, 2015, this court filed an opinion directing appellate counsel to file a notice of appeal on petitioner’s behalf within 30 days of the opinion becoming final. (*In re Hernandez* (Oct. 8, 2015, G052350) [nonpub.opn..])

The opinion in this case was final on November 8, 2015. On November 18, 2015, petitioner filed a motion to recall the remittitur because the notice of appeal had not been filed by November 8, 2015. In the order granting petitioner’s motion to recall the remittitur, the parties were asked to file any opposition to the court granting relief pursuant to *In re Benoit* to allow petitioner another 30 days to file the notice of appeal without the issuance of an order to show cause. Again, the Attorney General graciously

* Before O’Leary, P. J., Aronson, J., and Thompson, J.

advised this court that she does not oppose granting the petition without the issuance of an order to show cause.

The principle of constructive filing of the notice of appeal should be applied in situations where a criminal defendant requests that counsel file a notice of appeal on his behalf and counsel fails to do so in accordance with the law. (*In re Benoit* (1973) 10 Cal.3d 72, 87-88.) This is because an attorney who has been asked to file a notice of appeal on behalf of a client has a duty to file a proper notice of appeal. (Pen. Code § 1240.1, subd. (b).) Hernandez's reasonable reliance on the promise of trial and appellate counsel to file a timely notice of appeal entitles him to the relief requested.

The petition is granted. On Hernandez's behalf, Attorney Anna M. Jauregui-Law is directed to prepare and file a notice of appeal in Orange County Superior Court case No. 12NF0439, and the clerk of the superior court is directed to accept the notice for filing if presented within 30 days of this opinion becoming final. Further proceedings, including the preparation of the record on appeal, are to be conducted according to the applicable rules of court. In the interest of justice, the opinion in this matter is deemed final forthwith.